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Abner W. Sibal
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20506

Dear Mr. Sibal:

This responds to your June 9, 1978 letter to Mr. Hansell about the 1953 Treaty of Friendship, Commerce and Navigation between the United States and Japan (the FCN Treaty). Your letter asks for our views on four questions; the questions and our views are set forth below.

1. Does the treaty permit subsidiaries of Japanese companies which are organized under the laws of a state of the United States to fill all its top management positions with Japanese nationals admitted as treaty traders? Would it be inconsistent with the terms of the treaty to rule that even top management positions are subject to Title VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of race, sex or national origin?

Article VIII(1) of the FCN Treaty gives nationals and companies of each Party the right to employ, in the territory of the other, "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." This provision was intended to ensure that U.S. companies operating in Japan could hire U.S. personnel for critical positions, and vice versa. The phrase "of their choice" should be interpreted to give effect to this intention, and we therefore believe that Article VIII(1) permits U.S. subsidiaries of Japanese companies to fill all of their "executive personnel" positions with Japanese nationals admitted to this country as treaty traders. We express no opinion on what positions

would, in a particular case, qualify as "executive personnel."

" We do not believe the phrase "of their choice" should be read as insulating the employment practices of foreign companies from all local laws. For example, the Treaty does not in our view confer any right to hire in violation of child labor laws; nor does it require the Department to issue a treaty trader visa to persons otherwise ineligible to enter the United States under the Immigration and Nationality Act. Similarly, we do not believe that it confers any right to discriminate against a particular sex, religious, or minority group.* The right granted by the Japanese FCN Treaty to Japanese enterprises operating in the United States is simply the right to fill certain positions with Japanese nationals; American companies operating in Japan enjoy the equivalent right.

2. Is the situation different if the company doing business in the United States is not incorporated in the United States?

Article VIII is addressed to "nationals and companies of either Party...within the territories of the other Party." Article XXIII defines "companies" as "corporations, partnerships, companies and other associations, whether or not with limited liability and whether or not for pecuniary profit." In

* Both the Japanese and United States Governments have subscribed to a number of international declarations calling on multinational enterprises to respect human rights and avoid discrimination. See point 7 of the 1976 OECD Guidelines for Multi-national Enterprises and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. These are not binding, but they reinforce our view that Article VIII should not be read as conferring a license to discriminate.

determining the scope of Article VIII, we see no grounds for distinguishing between subsidiaries incorporated in the United States owned and controlled by a Japanese company and those operating as unincorporated branches of a Japanese company; nor do we see any policy reason for making the applicability of Article VIII dependent on a choice of organizational form.

3. What criteria are used by the Department of State in determining what positions are within the scope of the treaty when it issues non-immigrant visas to treaty traders?

The criteria derive from section 101(a)(15)(E)(i) of the Immigration and Nationality Act of 1952, as amended, and 22 C.F.R. § 41.40 et. seq. In addition to the statute and regulations (which do not define "executive personnel"), consular officers have access to the Advisory Opinions of the State Department's Visa Office (special guidance to U.S. consular officers upon request); the Administrative Decisions Under the Immigration and Nationality Laws of the United States by the Board of Immigration Appeals of the INS; and judicial decisions rendered upon appeals from the rulings of the INS.

The Department of State, through its consular officers in American embassies and under limited circumstances its Visa Office in the United States, and the Immigration and Naturalization Service in the case of change of visa requests, determines on an individual basis whether an applicant is entitled to a non-immigrant visa as a treaty trader. In making this determination, both the qualifications of the applicant and proposed position of employment are examined.

In granting a non-immigrant treaty trader visa, the Department (or INS) thus makes an administrative determination that a visa applicant will fill an "executive personnel" position, but this determination is made for the limited purpose of administering the visa laws. We do not believe that the determination should preclude judicial review of the scope of the term "executive personnel" for other purposes, including the application of Title VII.

4. Is any supervision exercised to determine if persons admitted as treaty traders do in fact operate in the type of position for which they were admitted? What sanctions are imposed if violations are found?

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Under the terms of their visas, treaty traders must file annual reports with the INS to show that they are maintaining their treaty trader status. If, on the basis of information furnished in an annual report, the INS determines after investigation that an alien no longer qualifies as a treaty trader, the INS is authorized to order the alien to leave the country, and, if necessary, to deport the alien (8 U.S.C. Section 1257(9); 8 C.F.R. Sections 241.2 and 241.9). During the course of a nonimmigrant's stay in the United States, the INS also has authority to monitor the alien's employment to insure that it complies with the terms of the alien's visas. Private parties may trigger such an INS investigation by lodging a complaint with the district INS office.

If you have any further questions or if we can provide further help, please let us know.

Sincerely,


Leo R. Mark
Deputy Legal Adviser

bcc: L/EB - Frank Willis
Carl F. Salans, Esq.